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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 544

HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KIEROF, DAVID C. BRODERICK and JOHN J. TULLMAN,

Appellants,

The Honorables DAVID W. PECK, CHARLES D. BREITEL, BERNARD BOTEIN, BENJAMIN J. RABIN, MARTIN M. FRANK, FRANCIS L. VALENTE and JAMES B. M. McNALLY, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department,

Appellees.

MOTION TO DISMISS APPEAL

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HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KILROE, DAVID C. BRODERICK and JOHN J. TULLMAN,

Appellants,

v.

The Honorables DAVID W. PECK, CHARLES D. BREITEL, BERNARD BOTEIN, BENJAMIN J. RABIN, MARTIN M. FRANK, FRANCIS L. VALENTE and JAMES B. M. MCNALLY, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department,

Appellees.

MOTION TO DISMISS APPEAL

The above named appellees, David W. Peck, Charles D. Breitel, Bernard Botein, Benjamin J. Rabin, Martin M. Frank, Francis L. Valente and James B. M. McNally, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, hereby move this Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, for an order dismissing the above captioned appeal on the ground that the appeal does not present a substantial federal question.

Statement of the Case

This is an action for a declaratory judgment instituted in the courts of New York State against the presiding Justice and the six associate Justices of the Appellate Division of the Supreme Court for the First Judicial Department. The appellants, all of whom are attorneys engaged in the practice of their profession in the First Judicial Department of New York State, seek a judgment that the Court is without power to promulgate and enforce Rule 4 of the Special Rules of the Appellate Division, First Department, governing the conduct of attorneys practicing in that department.

In New York State the historic and traditional judicial power and control over attorneys has for many years been vested by statute in the Appellate Divisions of each of the four Judicial Departments (New York Judiciary Law, § 90(2)), and a majority of the Justices of each of the Appellate Divisions is given the power to adopt special rules with respect thereto (New York Judiciary Law, § 83). For the past thirty years, the Appellate Division for the First Department has maintained and enforced Special Rules dealing with the conduct of attorneys with respect to contingent fees in claims and actions for personal injury and wrongful death. These rules set up detailed standards of conduct for attorneys acting under such retainers and provide that the violation of the rules shall be deemed professional misconduct (Rules 4(A), 4(B), 4(D), 4(E), 4(F), 4(G) of the Special Rules of the Appellate Division, First Department). Similar rules have been adopted by the Appellate Division for the Second Department, and more recently by the Appellate Division for the Fourth Department.

Rule 4, which is the subject of this action, was first adopted on September 21, 1956, to be effective January 1, 1957. It provides that in personal injury and wrongful

death actions where the compensation of the plaintiff's attorneys is contingent, the receipt of compensation which is equal to or less than the schedule of fees set forth in the Rule is deemed to be fair and reasonable but that the receipt of compensation in excess of the scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics (Papers on Appeal to the Court of Appeals, ff. 91 ff.). The original schedule ran from 50% on the first $1,000,00 of the sum recovered to 15% on amounts in excess of $50,000,00, of the sum recovered. After a public hearing held on December 4, 1956 the Rule was amended and the schedule changed to raise the lower end of the sliding scale to 25% on all amounts in excess of $25,000,00. The amendment also provided as an alternative to the sliding scale a flat 33⅓% of the sum recovered in the event the original contractual arrangement between the attorney and the client so provides (*ibid.* f. 104). The Rule requires that there be filed with the Clerk of the Court a closing statement divulging the amount of recovery, the cost and expenses of the litigation and the net amounts received by the client and by the attorney (*ibid.* ff. 111-115). This part of the Rule is not challenged. Finally, and most importantly, provision is made for an application to the appropriate Court by the plaintiff's attorney in the event he believes in good faith that the schedule will not afford him adequate compensation because of the circumstances of the case. Upon such application, the appropriate Court may, in its discretion, authorize the receipt of additional compensation (*ibid.* ff. 107-110).

This matter was brought on by a motion for summary judgment upon behalf of the appellants. Under the New York practice, the Court may award summary judgment to either party upon such a motion.

The parties are agreed that no question of fact is here presented and the reasonableness of the Rule, as well as

the need for it, were conceded for the purposes of this litigation. The appellants' motion papers stated that whether the Rule was good or bad, necessary or unnecessary, desirable or undesirable, fair or unfair, the Court was without power to adopt and enforce it (*ibid.* ff. 25, 26). The appellees' affidavit in opposition to the motion related in some detail the background of the Rule, its purpose and the compelling circumstances which moved the Court to promulgate it (*ibid.* ff. 42-123).

In the courts of New York State, the main thrust of the attack on the Rule was mounted on the premise that it was a fee-fixing device unrelated to the power of the Court over the professional conduct of attorneys and that the Rule was in conflict with § 474 of the New York Judiciary Law, which provides that the compensation of attorneys is governed by agreement. The appellants conceded that a contract between attorney and client calling for unconscionable compensation was not enforceable in the courts of New York State and that the Appellate Division had plenary power to discipline an attorney for the receipt of unconscionable compensation. The appellants contended, however, that the Court was limited in the exercise of its disciplinary power to acting on an *ad hoc* basis after the fact and that it could not promulgate in advance standards of conduct respecting professional compensation.

The appellees argued that the Rule was promulgated in the exercise of the Court's power over the conduct of attorneys and was designed to remedy an evil that had grown up in the First Department whereby a pattern of 50% contingent fees had developed without regard to the nature and the extent of the professional services rendered. The Court pointed out that the Rule set forth for the guidance of the Bar standards by which the Court would be governed in administering its disciplinary power.

The Opinions below

Both the Special Term of the Supreme Court of the State of New York and the Appellate Division struck down the Rule on the theory that it constituted a fee-fixing device beyond the power of the Court and violated the statutory provision that the compensation of an attorney is governed by agreement, unrestrained by law. (6 Misc. 2d 739, 5 A. D. 2d 303.)

The Court of Appeals reversed and ordered the entry of judgment in favor of the appellees, upholding the validity of the Rule and the power of the Court to promulgate and enforce it. In the course of its determination, the Court of Appeals laid down a definitive interpretation of the Rule which is binding for all purposes on the courts of New York State. The Court rejected the assumption of the appellants that the Rule threatened disciplinary action against attorneys who had entered into retainer agreements that were valid and enforceable under the laws of New York State and held that the Rule did not affect the substantive law governing the relationship between attorney and client but was a procedural device for determining upon the basis of the facts whether a lawyer was subject to discipline for charging more than he could collect in Court from his client under law applicable to every part of the State. The Court viewed the schedules as having a presumptive effect, akin to the burden of proof, and construed the Rule as a procedural device whereby the lawyer may discharge his traditional burden of justifying his compensation arrangements under circumstances which, standing alone, call for an explanation. The Court concluded that the promulgation of the Rule constituted a valid exercise of the power and control of the Appellate Division over the professional conduct of attorneys practicing within the Department.

The Constitutional Questions Presented Are Not Substantial

Although the constitutionality of Rule 4 was briefed and argued in the courts of New York State, and thus drawn in question, this Court should decline jurisdiction on the ground that the constitutional questions presented are not substantial in character. *Zucht* v. *King*, 260 U. S. 174.

Some measure of the lack of substance that inheres in these constitutional issues may be found in the circumstance that eleven of the twelve judges who had the matter *sub judice* did not advert to them in the course of their determinations. Although the issues were briefed and argued before the Special Term of the Supreme Court, the Appellate Division and the Court of Appeals, they are not treated in the opinion of the Special Term, the opinion of the Appellate Division, the majority opinion in the Court of Appeals or the dissenting opinion of Judge Froessel in the Court of Appeals. The sole reference to these issues is found in the concluding paragraph of the dissenting opinion of Judge Burke in the Court of Appeals. Moreover, the seven Appellate Division judges who promulgated the Rule (the appellees herein) were quite obviously free from doubt as to its constitutionality.

The argument in support of the Jurisdictional Statement proceeds on the wholly unwarranted assumption that the courts of New York State are free to disregard the interpretation placed upon the Rule by the Court of Appeals. Thus, at page 15 of the Jurisdictional Statement, it is contended that all attorneys in New York State, save those in the First Department, are free to enforce their contract for compensation made with competent, adult clients, in the absence of fraud or over-reaching: Yet, the Court of Appeals has held that the Rule does not touch lawyers' fees, except such as would be unenforceable under rules

of law applicable to the whole State. This construction of the Rule is binding upon this Court in the exercise of its appellate jurisdiction. *Ward* v. *Krinsky*, 259 U. S. 503.

Since the Rule, as authoritatively interpreted by the Court of Appeals, inhibits, by the threat of discipline, only such compensation as would be uncollectible as a matter of law, it follows that constitutional objections based on due process and equal protection must fall. From time immemorial, lawyers have always been called upon to justify the arrangements made with clients respecting professional compensation and the Canons of Ethics have long provided that contingent fees are subject to the supervision of the Court as to reasonableness. (Canon 13 of the Canons of Ethics of the New York State Bar Association.) These principles are binding upon all of the lawyers of the State without regard to any rules of Court. The sole effect of the Rule, therefore, is to move forward the traditional judicial supervision and burden of justification to a time prior to the receipt of the compensation. Moreover, the Rule is limited in its application to compensation arrangements over and above the specified percentages and the reasonableness of this presumptive classification is not challenged. As the Court of Appeals pointed out, the Appellate Division has the undoubted power to require every lawyer, filing a closing statement on a contingent fee retainer, to disclose the nature and the extent of the services devoted to the cause and thereafter to discipline individual lawyers for the receipt of unconscionable compensation. Included within this broad power of supervision lies the narrow area encompassed by the Rule in question.

That the Rule is a necessary one in the First Department is conceded for the purposes of this litigation. (*Ibid.* ff. 25, 26). The validity of this concession is attested by the circumstances that gave rise to the Rule. (*Ibid.* ff. 47-63). For the past thirty years, Special Rules respecting

contingent fee arrangements have prevailed in both the First and Second Departments and they have long been accepted and acquiesced in by the Bar. The Third Department, on the other hand, has found no need for such rules and the Fourth Department has just recently seen fit to adopt them. Section 83 of the New York Juidiciary Law presupposes that different conditions in the various departments give rise to the need for different rules and hence each Appellate Division is empowered to adopt its own Special Rules. Since Rule 4 does not change the substantive law governing the relationship between attorney and client, the circumstance that it is applicable only to attorneys practicing in the First Department raises no constitutional question. The attorney in the First Department has the same right as any other lawyer in New York State to enforce a valid and subsisting contract for compensation. The fact that he may be called upon at an earlier date to justify what appears on its face to be an unconscionable contract solely within the framework of the disciplinary control of the Bar by the Appellate Division constitutes no infringement of his constitutional rights. This is one of the burdens which accompany the position of responsibility he holds in the judicial system. *Theard v. United States*, 354 U. S. 278. The Rule does not operate directly on the contract or the right to enforce it in an action based on the contract.

Finally, it is clear that this cause involves neither the vitality nor independence of the American Bar. No lawyer will be heard to suggest seriously that the price of "fearless advocacy" is a constitutionally protected right to contingent fees, free from disciplinary limits or supervision. Neither the appellees nor any other court of the State of New York has asserted or attempted to exercise a "power to restrict and limit fees whenever it sees fit so to do". The Rule was designed and intended to do no more than set standards of professional propriety. The flexible nature of these concededly reasonable standards is evi-

denced by the explicit recognition in the Rule that circumstances may render the resulting compensation inadequate and by the provision empowering the appropriate Court to authorize the receipt of additional compensation. (*Ibid.* ff. 107-110.) The appellees have consistently adopted this construction of the Rule and their interpretation has now been made definitive by the Court of Appeals.

CONCLUSION

It is submitted that the constitutional questions presented in the Jurisdictional Statement are lacking in substance and the appeal should, therefore, be dismissed.

December 21, 1959.

Respectfully submitted,

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